

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

December 3, 2007 Session

**JOHN S. BRIGHT v. CRYSTAL L. GUE, M.D., ET AL.**

**Appeal from the Circuit Court for Knox County  
No. 1-40-05     Dale C. Workman, Judge**

---

**No. E2007-00127-COA-R3-CV - FILED FEBRUARY 19, 2008**

---

In this medical malpractice case, the trial court granted summary judgment in favor of the hospital and a treating physician. Subsequently, the trial court denied the plaintiff's motion to set aside the summary judgment in favor of the physician. We vacate the trial court's judgment denying the motion to set aside its summary judgment in favor of the physician upon our finding that the plaintiff was denied adequate notice of the hearing on the motion for summary judgment. We vacate the summary judgment in favor of the hospital upon our determination that the hospital did not negate the claimed basis of the plaintiff's suit or demonstrate that the plaintiff's complaint was time barred under the applicable statutes of limitation.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Vacated; Cause Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Douglas E. Taylor, Sevierville, Tennessee, for the appellant, John S. Bright.

Stephen C. Daves and Jeffrey R. Thompson, Knoxville, Tennessee, for the appellee, University of Tennessee Medical Center.

Heidi A. Barcus and Hillary B. Jones, Knoxville, Tennessee, for the appellee, Russell J. Smith, M.D.

**OPINION**

***I. Background***

On January 21, 2005, the appellant, John S. Bright, filed a verified complaint for medical malpractice against various medical entities, including the appellees, Russell J. Smith, M.D., and the University of Tennessee Medical Center ("UTMC"). Inter alia, the complaint states that on or about

September 22, 2003, Mr. Bright was admitted to UTMC for treatment of an infection to his hands and fingers, which the defendants diagnosed as “flesh eating bacteria,” and that the defendants prescribed various drugs and other therapies based upon that diagnosis. The complaint further states that as a result of the defendants’ care and treatment, Mr. Bright suffered from digestive problems that required further treatment and that when he was discharged from the hospital on September 29, 2003, he had lost skin and muscle tissue in his hands and “was left with severe scarring which requires surgical repairs, and with permanent impairment of his hands.” Further, the complaint asserts that on January 15, 2004, Mr. Bright experienced a recurrence of the same medical condition for which he had consulted the defendants, but that on this occasion, he consulted a different physician who, on January 22, 2004, advised him that, in fact, his condition was not caused by a “flesh eating bacteria,” but rather, by “a much less severe condition which was successfully treated with an ointment.” Because of the defendants’s alleged misdiagnosis and subsequent treatment based upon such misdiagnosis, the complaint maintains Mr. Bright has suffered and will suffer various injuries and costs and requests that he be awarded a judgment for compensatory damages in a reasonable amount to be determined by a jury.

#### ***A. Dr. Smith’s Motion for Summary Judgment***

On September 6, 2006, Dr. Russell Smith filed a motion for summary judgment upon grounds that 1) his care and treatment of Mr. Bright met the relevant standard of care governing an infectious disease physician and 2) Mr. Smith’s complaint was filed over one year after his last treatment or interaction with Mr. Bright and was, therefore, barred by the applicable statutes of limitation. Attached in support of this motion was Dr. Smith’s own affidavit as an expert attesting that he did not deviate from the standard of care applicable to physicians of his specialty in his care and treatment of Mr. Bright.

After a hearing on October 13, 2006, the trial court entered its order granting Dr. Smith’s motion for summary judgment upon specified grounds that there was no evidence that Dr. Smith violated the applicable standard of care or that any act or omission by him contributed to any injuries or damages to Mr. Bright. Neither Mr. Bright nor his attorney were present at the October 13, 2006 hearing, and thereafter, on November 10, 2006, Mr. Bright filed a motion pursuant to Tenn. R. Civ. P. 59 and/or 60 to set aside the order granting summary judgment upon the ground that his attorney, Douglas E. Taylor, did not receive notice of such hearing as attested by Mr. Taylor’s supporting affidavit, which provides in pertinent part as follows:

On the 13<sup>th</sup> day of October, 2006, I was informed that the Court entered an Order granting the Motion For Summary Judgment of the Defendant, Russell J. Smith, M.D.

I was in the Sevier County Chancery Court on the 13<sup>th</sup> day of October, 2006, having been noticed to a hearing there.

I did not receive notice of the above hearing in the Knox County

Circuit Court.

Given that the 13th of October is my wedding anniversary and a day I had attempted to keep clear on my calendar for obvious reasons, I would have been particularly aware of any notice for that date and I would have identified the conflict and notified counsel and the Court, had notice been received.

The notice for the above hearing was actually delivered to my office on the 25<sup>th</sup> day of October, 2006.

The Notice, postmarked September 27, 2006, was sent to the wrong address.

I was informed on the afternoon of the 13th of October, 2006, that a telephone call was made to my office by Defendant's counsel at some time the morning of October 13, 2006.

I was informed by my receptionist that she informed the caller I was in court in Sevierville.

I arrived at the Sevier County Courthouse on the above hearing date shortly before 9:00 a.m., and, upon leaving the courtroom in Sevierville at around 1:30 p.m., on the above date, I turned my cell phone on, having been required to turn the cell phone off while in court, and received a message from Defendant's counsel that the hearing had been scheduled that morning and that the Court had already ruled on the Defendant's Motion.

Neither the Plaintiff or I was aware of the hearing in Knox County Circuit Court set for the 13<sup>th</sup> of October, 2006, until I received the above voice message after the Court had apparently ruled on the Defendant's Motion.

My absence and the absence of Plaintiff at the above hearing in Knox County Circuit Court was not willful, but was due to lack of knowledge of the hearing, mistake, inadvertence, surprise or excusable neglect and the relief sought by Plaintiff in its Motion To Set Aside Judgment would afford justice in this matter.

Also attached to the motion to set aside the judgment is a copy of a notice from the Knox County Circuit Court to Mr. Taylor indicating that the motion for summary judgment is set for hearing on October 13, 2006. This notice is addressed to:

Douglas E[.] Taylor  
124 Court Ave/ Suite 201  
Sevierville, TN 37862

Contrary to the address on this notice, in Mr. Bright's complaint, Mr. Taylor's address was listed as 248 Bruce Street, Mill Corner Place, Suite Five, Sevierville, Tennessee, 37862.

The motion to set aside the judgment came on for hearing on December 8, 2006, and thereafter, by order entered December 20, 2006, the motion was denied. Subsequently, Mr. Bright filed timely notice of his appeal of this order.

***B. UTMC's Motion for Summary Judgment***

On December 22, 2006, UTMC also filed a motion for summary judgment upon grounds that it complied with the applicable standard of professional practice, that no act or omission of any UTMC employee or agent caused or contributed to any claimed injury or damage to Mr. Bright, and that Mr. Bright's complaint was time barred under the one year statutes of limitation set forth at Tenn. Code Ann. §§ 28-3-104 and 29-26-116. In support of this motion, UTMC referenced the affidavit of Mary Alice Bozeman, R.N., wherein she attested that all hospital employees and agents of UTMC complied with the recognized standard of professional practice in their care and treatment of Mr. Bright, and that he did not suffer any harm or injury as a proximate result of any act or omission of any UTMC agent or employee. With relation to the asserted ground that Mr. Bright's complaint was time barred by the one year statute of limitations, Ms. Bozeman's affidavit further attested that Mr. Bright did not return to UTMC after December 18, 2003, and as previously noted, his complaint was not filed until over one year later, on January 21, 2005.

In his response to UTMC's motion for summary judgment, Mr. Bright denied that there is no genuine issue of material fact and asserted, inter alia, that with regard to UTMC, "the sole event at issue is a biopsy taken by [UTMC], which biopsy sample was dropped on the floor and the same sample was then picked up and submitted for review." In support of the assertion that the biopsy sample was dropped, Mr. Bright referenced portions of deposition testimony of himself and his wife, Kristine Morphew, and his and Ms. Morphew's affidavits which respectively provided in pertinent part as follows:

During my several visits to the UT Medical Center hospital, I had two biopsies done on my hands.

During one of the biopsies, a doctor or technician or hospital employee who performed the biopsy, complained that he had been provided the wrong surgical kit, but said it would work and proceeded with the biopsy.

After taking the sample, the above person taking the biopsy dropped the sample on the floor of the room where the biopsy was being performed, scooped the sample up off of the floor stating it would be alright [sic], and took the sample which came from the floor for testing.

My wife, Krisitine Morphew, was present at the above biopsy.

I was later told by Dr. Russell Smith that the biopsy was inconclusive.

Ms. Morphew's affidavit further stated as follows:

During my husband's several visits to UT Medical Center hospital, he had two biopsies done on his hands . . . .

During one of the biopsies taken at UT Medical Center, for which I was present, the doctor or technician or hospital employee who performed the biopsy, complained that he had been provided the wrong surgical kit, but said it would work and proceeded with the biopsy.

After taking the sample, the above person taking the biopsy dropped the sample on the floor of the room where the biopsy was being performed, scooped the sample up off of the floor stating that it would be alright [sic], and took the sample which came from the floor for testing.

UTMC's motion for summary judgment was heard on April 10, 2007, and was granted by order entered the same date. Thereafter, Mr. Bright filed timely notice of his appeal of this order.

Upon Mr. Bright's request, his appeals of the trial court's orders of December 20, 2006, and April 10, 2007, were consolidated for hearing before this Court.

## ***II. Issues***

We address the following issues:

- 1) Whether the trial court erred in denying Mr. Bright's motion to set aside its order granting Dr. Smith's motion for summary judgment.
- 2) Whether the trial court erred in granting UTMC's motion for summary judgment.

### *III. Analysis*

#### *A. Standard of Review*

Summary judgments enable courts to conclude cases that can and should be resolved on dispositive legal issues. *See Byrd*, 847 S.W.2d 208, 210 (Tenn. 1993); *Airport Props. Ltd. v. Gulf Coast Dev., Inc.*, 900 S.W.2d 695, 697 (Tenn. Ct. App. 1995). They are appropriate only when the facts material to the dispositive legal issues are undisputed. Accordingly, they should not be used to resolve factual disputes or to determine the factual inferences that should be drawn from the evidence when those inferences are in dispute. *See Bellamy v. Federal Express Corp.*, 749 S.W.2d 31, 33 (Tenn. 1988).

To be entitled to a summary judgment, the moving party must demonstrate that no genuine issues of material fact exist and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d at 210; *Planet Rock, Inc. v. Regis Ins. Co.*, 6 S.W.3d 484, 490 (Tenn. Ct. App. 1999). A summary judgment should not be granted, however, when a genuine dispute exists with regard to any material fact. *Seavers v. Methodist Med. Ctr.*, 9 S.W.3d 86, 97 (Tenn. 1999); *Hogins v. Ross*, 988 S.W.2d 685, 689 (Tenn. Ct. App. 1998). Our task on appeal is to review the record to determine whether the requirements for granting summary judgment have been met. *See Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Aghili v. Saadatnejadi*, 958 S.W.2d 784, 787 (Tenn. Ct. App. 1997). Tenn. R. Civ. P. 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see Byrd*, 847 S.W.2d at 210; and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *See Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn. 1993). A party seeking a summary judgment must demonstrate the absence of any genuine and material factual issues. *Byrd* 847 S.W.2d at 214.

When the party seeking summary judgment makes a properly supported motion, the burden shifts to the non-moving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *See Byrd* 847 S.W.2d at 215. *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). The non-moving party may not simply rest upon the pleadings, but must offer proof by affidavits or other discovery materials (depositions, answers to interrogatories, and admissions on file) provided by Rule 56.06 showing that there is a genuine issue for trial. If the non-moving party does not so respond, then summary judgment, if appropriate, shall be entered against the non-moving party. Tenn. R. Civ. P. 56.06.

Summary judgments do not enjoy a presumption of correctness on appeal. *See Nelson v. Martin*, 958 S.W.2d 643, 646 (Tenn. 1997); *City of Tullahoma v. Bedford County*, 938 S.W.2d 408, 412 (Tenn. 1997). Accordingly, when we review a summary judgment, we view all the evidence in the light most favorable to the non-movant, and we resolve all factual inferences in the non-movant's favor. *See Luther v. Compton*, 5 S.W.3d 635, 639 (Tenn. 1999); *Muhlheim v. Knox County Bd. of Educ.*, 2 S.W.3d 927, 929 (Tenn. 1999). A summary judgment will be upheld only when the

undisputed facts reasonably support one conclusion - that the moving party is entitled to a judgment as a matter of law. See *White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn. 1998); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995).

We further note that “[t]he setting aside of a summary judgment . . . lies within the sound discretion of the Trial Court.” *Marr v. Montgomery Elevator Co.*, 922 S.W.2d 526, 528 (Tenn. App. 1995). In *Eldridge v. Eldridge*, the Tennessee Supreme Court stated as follows regarding the abuse of discretion standard:

Under the abuse of discretion standard, a trial court’s ruling “will be upheld so long as reasonable minds can disagree as to the propriety of the decision made.” *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

*Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (alterations in original).

An abuse of discretion occurs when the lower court’s decision is without a basis in law or fact and is, therefore, arbitrary, illogical or unconscionable. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 191 (Tenn. 2000).

### ***B. Summary Judgment for Dr. Smith***

First, we address Mr. Bright’s argument that the trial court abused its discretion in denying his motion to set aside its grant of summary judgment in favor of Dr. Smith. As previously noted, such motion was filed pursuant to Tenn. R. Civ. P. 59, which allows the trial court to amend a judgment “to correct a clear error of law or to prevent injustice,” *Bradley v. McLeod*, 984 S.W.2d 929, 933 (Tenn. Ct. App. 1998), and Tenn. R. Civ. P. 60.02, which, inter alia, allows a court to relieve a party from a judgment for “mistake, inadvertence, surprise or excusable neglect.” Mr. Bright contends that the trial court should have set aside its judgment because of the court’s failure to send notice of the hearing on the motion for summary judgment to his correct address. He asserts that as result of this mistake, he was absent from the hearing and was deprived of a filing deadline under Tenn. R. Civ. P. 56.04, which provides that a party opposing a motion for summary judgment

has until five days before the hearing on such a motion to file opposing affidavits. Upon our review of the record and the applicable law, we are compelled to conclude that the trial court abused its discretion in failing to set aside its summary judgment.

Dr. Smith argues that the trial court correctly denied Mr. Bright's motion to set aside its summary judgment because as of the time of the hearing on the motion to set aside the summary judgment, Mr. Bright had failed to present any evidence or argument rebutting Dr. Smith's motion for summary judgment and supporting expert affidavit. As authority for this argument, Dr. Smith relies on our decision in *Donnelly v. Walter*, 959 S.W.2d 166 (Tenn. Ct. App. 1997). The plaintiff in *Donnelly*, filed suit for medical malpractice, and defendants in the case filed motions for summary judgment with supporting affidavits. The plaintiff failed to submit an opposing affidavit in response. Neither the plaintiff nor his attorney was present at the subsequent hearing on the motion for summary judgment and the motion was granted. Thereafter, the plaintiff filed a motion to reconsider, requesting that her case be reinstated or that she be allowed to take a voluntary nonsuit. The trial court denied this motion, finding that plaintiff's attorney had received adequate notice of the hearing on the motions for summary judgment and that the plaintiff had failed to submit material in opposition to such motions. On appeal, the plaintiff argued that although he received adequate notice of the hearing on the motions for summary judgment, his absence from the hearing should have been excused because he inadvertently appeared at the wrong courthouse. However, we found no basis for vacating the trial court's judgment and stated as follows:

Assuming, solely for the purpose of argument, that counsel's failure to go to the correct courthouse for the hearing was excusable, we cannot overlook the fact that [the plaintiff] failed to support his motion to reconsider with any evidence making out a disputed material fact regarding the merits of the lawsuit. There was absolutely no reason to set aside the summary judgments in the absence of some indication that the plaintiff had a response to the defendants' properly supported motions.

Dr. Smith contends that even if Mr. Bright is excused from having failed to attend and submit evidence in opposition at the initial hearing on the motion for summary judgment, he should not be further excused for failing to respond to such motion by the time of the later hearing on the motion to set aside the summary judgment. We do not agree and find a clear distinction between the case before us and *Donnelly*. In *Donnelly*, it was undisputed that the plaintiff received proper notice of the initial hearing on the motion for summary judgment, whereas in the instant matter, it is clear from the record that, as a result of the Circuit Court clerk's negligence and/or mistake and due to no fault or mistake of Mr. Bright or his counsel, Mr. Bright did not receive proper notice of the hearing on the motion for summary judgment. As a consequence, there was failure to comply with Tenn. R. Civ. P. 6.04(1), which provides in pertinent part that "[a] written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five (5) days



before the time specified for the hearing.” The fact that Mr. Bright was given adequate notice of the hearing on the motion to set aside the summary judgment is irrelevant. The only issue before the trial court at the hearing on the motion to set aside its prior judgment was “Should summary judgment be set aside because the plaintiff did not receive adequate notice of the hearing on the motion for summary judgment?” It is undisputed that the clerk sent the notice of the hearing to the wrong address, and therefore, due to no fault of his own, Mr. Bright did not receive notice and therefore did not appear. Because notice of the hearing was required pursuant to Tenn. R. Civ. P. 6.04(1), the summary judgment should have been set aside. The issue of whether Dr. Smith was entitled to summary judgment was not before the court at the hearing on Mr. Bright’s motion to set aside the summary judgment. Quite simply, Mr. Bright’s obligation to raise a meritorious defense to the motion for summary judgment was not triggered because he was not provided with adequate notice of the hearing on the motion for summary judgment, and he was thereby denied due process. *See Mayes v. Jamco-KW, LLC*, No. E2005-01425-COA-R3-CV, 2006 WL 468766 at \*2 (Tenn. Ct. App. E. S., filed Feb. 28, 2006). Accordingly, we hold that the trial court abused its discretion in failing to grant Mr. Bright’s motion to set aside summary judgment in favor of Dr. Smith.

### ***C. Summary Judgment in Favor of UPMC***

Mr. Bright also argues that the trial court erred in granting UPMC’s motion for summary judgment. This motion stated the following as grounds for relief:

At all times pertinent, the care and treatment provided by UPMC employees and agents met the recognized standard of acceptable professional practice for hospital employees in Knox County, Tennessee in 2003.

No act or omission of any UPMC employee or agent caused or contributed to any claimed injury or damage of [Mr. Bright].

[Mr. Bright’s] claim is barred by the applicable statute of limitations found at T.C.A. § 29-26-116 and T.C.A. § 28-3-104.

In support of this motion, UPMC referenced the affidavit of Mary Alice Bozeman, R.N.; Mr. Bright’s UPMC medical records attached to such affidavit; the statement of undisputed facts; UPMC’s memorandum of law in support of the motion; and Mr. Bright’s complaint. Although not stated in the order granting the motion for summary judgment, it is apparently undisputed that the trial court’s ruling in favor of UPMC was based both 1) upon Mr. Bright’s failure to respond to the motion with expert testimony establishing a genuine issue of material fact and 2) upon his failure to file suit within the time required by applicable statutes of limitation. It is our determination that

the record does not support summary judgment on either ground.

Pursuant to Tenn. Code Ann. § 29-26-115(a), the plaintiff in a medical malpractice case such as the one at bar bears the burden at trial of proving the following:

- (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the claimant practices or in a similar community at the time the injury or wrongful action occurred;
- (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
- (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

As previously stated, before summary judgment may be granted the moving party must demonstrate that no genuine issues of material fact exist and that he or she is entitled to judgment as a matter of law. *Byrd*, 847 S.W.2d at 214. In order to satisfy this burden in the instant case, UTMCM was required to show that no genuine issue of material fact existed as to at least one of the three statutory elements set forth above. In further regard to the burden of proof imposed upon a party seeking summary judgment, the Tennessee Supreme Court has reiterated as follows:

Mere conclusory assertions that the non-moving party has no evidence is clearly insufficient. The movant must either affirmatively negate an essential element of the nonmovant's claim or conclusively establish an affirmative defense. If the movant does not negate a claimed basis for the suit, the nonmovant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails.

***McCarley v. West Quality Food Service***, 960 S.W.2d 585, 588 (Tenn. 2005).

In support of the trial court's grant of summary judgment, UTMCM relies upon the affidavit of Mary Alice Bozeman, R.N., that was attached to its motion. In that affidavit, Ms. Bozeman attests that she is a licensed nurse, that she is familiar with the recognized standard of hospital care in the local community, and that it is her opinion "to a reasonable degree of certainty that all [UTMCM]

hospital employees and agents complied with the recognized standard of acceptable professional practice applicable to hospital employees and agents in Knox County, Tennessee at all times during the care and treatment of [Mr. Bright] . . . and . . . that [he] did not suffer any harm or injury as a proximate result of any act or omission of any UTMC agent or employee.” Ms. Bozeman further attests that her opinion in this regard is based on her review of Mr. Bright’s UTMC medical records attached to her affidavit. Citing *Seavers*, 968 S.W.2d at 831., UTMC states that “[i]f the defendant refutes plaintiff’s allegations with expert testimony and the plaintiff produces no countervailing expert testimony, defendant is entitled to summary judgment.” Accordingly, UTMC insists Mr. Bright was required to present expert testimony in response to Ms. Bozeman’s affidavit and that his failure to do so warranted summary judgment against him. We do not agree.

In his response to UTMC’s motion for summary judgment, Mr. Bright alleged that during the course of his treatment, UTMC mishandled a biopsy sample taken from him, and he supported this allegation with the deposition testimony of himself and his wife. Mr. Bright’s response further asserted that this mishandled biopsy sample is “the sole event at issue” with regard to UTMC. Review of the medical records which formed the basis for Ms. Bozeman’s opinion reveals that the alleged incident of the mishandled biopsy sample was not included in such records, and UTMC does not assert that Ms. Bozeman was otherwise aware of this event or that she considered it in forming her opinion. It has not been indicated that Ms. Bozeman was aware of the dropping of the biopsy sample and that she considered that event in reaching her conclusions nor has UTMC demonstrated that the dropping of the biopsy sample did not occur, did not violate the applicable standard of care or did not cause Mr. Bright’s injuries. Therefore, it is our determination that UTMC’s motion for summary judgment should not have been granted on this ground. While we recognize that, pursuant to Tenn. Code Ann. § 29-26-115(a) and (b), if Mr. Bright is to prevail at trial he must submit expert testimony that the alleged mishandling of the biopsy sample constituted a violation of the standard of care and caused his injuries, UTMC did not, either in its motion for summary judgment or by subsequent pleading, raise Mr. Bright’s failure to support this allegation with expert testimony as a ground for summary judgment, and we do not agree that the obligation to present such expert testimony was triggered by UTMC’s motion for summary judgment. Under the circumstances presented, we do not agree that Mr. Bright’s failure to include an expert affidavit in his response to the motion for summary judgment warranted judgment against him.

As noted, UTMC’s motion for summary judgment was apparently granted on the additional ground that Mr. Bright failed to file his complaint within the time allotted under applicable law. In this regard, Tenn. Code Ann. § 28-3-104 provides that a personal injury action shall be commenced within one year after the date of the injury, and Tenn. Code Ann. § 29-26-116(2) provides that in malpractice actions, “[i]n the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.” In support of the trial court’s ruling in its favor on this ground, UTMC states that a plaintiff has one year from the date of injury to file his lawsuit. UTMC references Ms. Bozeman’s affidavit wherein she attested that Mr. Bright was last treated by an agent or employee of UTMC on December 18, 2003, and notes that his complaint was not filed until over one year later on January 22, 2005. However, UTMC’s

argument that filing on this date violated the statute of limitations totally disregards the provision of Tenn.Code Ann. § 29-26-116, which allows suit to be filed within one year of discovery. As previously stated, the complaint filed by Mr. Bright in this case was a verified complaint, and as such has the force and effect of an affidavit. See *Muse v. First People's Bank of Tennessee*, No. E2005-02869-COA-R3-CV, 2007 WL 845893, at \*7 (Tenn. Ct. App. E. S., filed Mar. 21, 2007), *Lavado v. Keohane*, 992 F.2d 601, 605 (6th Cir. 1993), *Knight v. Hospital Corp. of America*, No. 01A01-9509CV-00408, 1997 WL 5161, at \*4 n. 4 (Tenn. Ct. App. M. S., filed Jan. 8, 1997). As this Court has stated, “[u]nder our standard of review of the trial court’s grant of summary judgment, we are required to take as true verified facts favorable to the opponent of the motion.” *Hart v. Joseph Decosimo and Company, LLP*, 145 S.W.3d 67, 76 (Tenn. Ct. App. 2004). Thus, in the instant matter, the trial court was obliged to take as true the statement in Mr. Bright’s complaint that “[o]n or about the 22<sup>nd</sup> day of January, 2004, [he] was informed that he did not suffer from a ‘flesh eating bacteria’ as diagnosed by [UTMC], but was diagnosed with a much less severe condition which was successfully treated with an ointment.” “Discovery of injury” under Tenn. Code Ann. § 29-26-116 “means the discovery of the existence of a right of action, that is, facts which would support an action for tort against the tort-feasor. Such facts include not only the existence of an injury, but the tortious origin of the injury.” *Hathaway v. Middle Tenn. Anesthesiology*, 724 S.W.2d 355, 359 (Tenn. Ct. App. 1986). Mr. Bright’s complaint apparently asserts that the “tortious origin” of his injuries was UTMC’s misdiagnosis of his condition and commensurate treatment of his condition. His attestation that he discovered such misdiagnosis on or about January 22, 2004, within one year of the time his complaint was filed, was not refuted by UTMC and accordingly, summary judgment should not have been granted on the ground that his suit violated the statute of limitations.

#### ***IV. Conclusion***

For the reasons stated, the judgments of the trial court are vacated and the cause is remanded to the trial court for further action consistent with this opinion. Costs of appeal are assessed to Russell J. Smith, M.D., and the University of Tennessee Medical Center, equally .

---

SHARON G. LEE, JUDGE